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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. BRANDON JAMES BEMIS, Defendant and Appellant.	A151738 (Humboldt County Super. Ct. No. CR1603933)

Defendant and appellant Brandon James Bemis, who goes by the name Lyunna Bemis,[1] was convicted by a jury of a lewd act on a child under 14. Bemis contends the court improperly admitted evidence of two prior sexual offenses and other uncharged acts. We disagree and affirm.

BACKGROUND

In December 2016, Bemis was charged with one count of a lewd act upon a child (Pen. Code, § 288, subd. (a)) and one count of failure to register as a sex offender (Pen. Code, § 290.018, subd. (a)). The trial court severed the two counts for trial and proceeded with trial on count one.

[1] Bemis is a transgender woman. Upon Bemis's request and over the prosecution's objection, the trial court permitted counsel to use feminine pronouns when referring to Bemis. The parties' appellate briefs also refer to Bemis with feminine pronouns, so we do the same.

Prosecution Evidence

In April 2016, Jane Doe, then five years old, moved with her mother, Amanda B., into an apartment in Fortuna. Within a month, they met Bemis, their 21-year-old neighbor. They became friends.

On the evening of August 16, 2016, Bemis came to Amanda and Jane's apartment and offered to take Jane to her place for dessert. In need of a break from Jane, who was "pushing mom's buttons," Amanda readily agreed. Bemis had briefly visited earlier that day and was a trusted friend. Jane had been to Bemis's place once before without Amanda and was excited to go.

When Bemis and Jane arrived, there were several people inside Bemis's apartment, including housemates, Codie D. and her boyfriend, and a couple of other friends. One remembered Jane "was very hyper." Eventually, Jane went into Bemis's bedroom.

Jane was six years old during trial and was "nervous" and "[r]eally embarrassed" to discuss the evening's events. She remembered visiting Bemis's apartment once but did not remember her last visit and said she never got to see Bemis's bedroom. Asked whether she remembered telling her mother that Bemis had her show her private parts, Jane said yes. She remembered telling her mother they were in Bemis's bedroom. She added that it was Bemis's idea. Bemis told her she had to pull down her pants and underwear. Jane also said Bemis touched her vagina with her finger. She did not remember Bemis asking Jane to keep it a secret from her mother. Nor did she remember whether Bemis had a camera at the time.

According to Amanda, after about a 30 to 45-minute visit, Bemis brought Jane home and left so Jane could bathe. After her bath, Jane appeared "kinda anxious, nervous" and "jittery" and said she had a secret she had to tell. Jane said Bemis told her not to say anything but she wanted to tell her mother. She told her mother that Bemis "looked at her privates" and said "her privates look like a pretty pink bow."

The next day, Amanda and her "big cousin" confronted Bemis. The cousin angrily asked her, "What'd you do to my niece?" Bemis tried to talk to Amanda and told

Amanda she "wouldn't do anything like that." But her cousin insisted that Bemis talk to him, and he called Bemis a child molester At that point, Bemis pulled a knife on the cousin. Amanda yelled, and Bemis backed off and put the knife down. Amanda and her cousin left.

Fortuna police were contacted regarding a suspected child abuse case and a couple of officers, including Officer James Jengeleski, responded. Amanda spoke with Officer Jengeleski and told him of the possible sexual assault. Officer Jengeleski then spoke with Bemis. Bemis told him Jane came over to her apartment for dessert the night before. She acknowledged they were in her bedroom but denied that they did anything inappropriate. The officers also spoke with the other adults at the apartment. Officer Jengeleski did not see or speak with Jane. The officers instructed Amanda to stay away from Bemis, but they did not ask Amanda to take Jane for a medical exam.

About a week later, Amanda asked Jane if Bemis touched her. Jane said yes and motioned toward her vagina. Amanda asked Jane what Bemis touched her with, and she indicated her finger. Amanda did not discuss the matter further with Jane, but she reported the new information to Officer Jengeleski. She did not take Jane for a medical exam. She never inspected her underwear for blood, and did not recall Jane ever complaining about any vaginal discomfort or pain. When she was asked why she did not seek an exam, Amanda responded, "I didn't think about it, and I didn't want her to have to experience that."

Around this time, Officer Jengeleski also received a report that girls underwear was found in Bemis's bedroom while the room was being cleaned after Bemis moved out. The underwear, which looked like girls underwear and had not been washed, was found in a plastic bag in the closet. Officer Jengeleski retrieved the underwear, 13 pairs in all, from the apartment and entered it into evidence.

On August 24, 2016, eight days after Jane's visit to Bemis's apartment, a social worker on the Child Abuse Services Team (CAST) interviewed Jane. The video was played for the jury, which was provided a transcript of the interview.

Asked about the last time she saw Bemis, Jane stated, "[T]he last time I saw [her] was oh my gosh, she did something wrong. . . . Its kinda [*sic*] about um . . . a part . . . your privates . . . . [S]he kind of looked at my privates." She went into Bemis's bedroom and Bemis shut the door, which was "locked for no one else to know." Bemis told her it was a secret. Asked how she knew the door was locked, she initially said "because I saw she had a key and lock" but later acknowledged, "I don't really know how I know it was locked I'm just smart." Asked what happened when she was in the room, Jane said, "Um . . . I don't remember." When Jane was asked to say more about her "privates," Jane stated, "I don't really know. [¶] . . . [¶] I kinda . . . want to stop talking right now." After a break, Jane was asked again about what happened after Bemis's bedroom door was shut. Jane said "[s]omebody knocked, but [Bemis] didn't answer it. [¶] . . . [¶] [Bemis] didn't want anybody to come in, so he doesn't answer when somebody knocked." Asked what happened next, Jane responded, "Um . . . I don't really remember. Now, I don't remember." When asked whose "privates" she referred to earlier, Jane answered, "Mine." She said Bemis saw her privates. Asked how it happened, Jane said she was "kind of a little nervous . . . that's all I remember."

Jane was shown a picture of a body and asked to name the various parts. Asked what private spot Bemis saw, she pointed to the vagina which she referred to as the "cooch" spot. Jane said her pants and panties were pulled down to her knee-area. Bemis touched her "cooch spot [¶] . . . [¶] the part that [Jane] never wanted anyone to touch." Jane said she told Bemis the touch made her uncomfortable and feel "[n]ot very good." Bemis stopped. Asked what Bemis touched her with, Jane responded "she touched it with her fingers" and was "just looking at it." Bemis said it was cute. Bemis also touched Jane's toes and said they were cute, too. This happened while Jane was lying on her back on a pillow and Bemis sat. Jane never said Bemis put anything in her vagina. Jane said she did not touch Bemis. Asked if Bemis had a camera or a phone, Jane said she had a phone. Jane added that Bemis sometimes took pictures of her but did not know the type of pictures. Asked if Bemis took pictures of the " 'cooch,' " Jane replied, "Yeah." Afterwards, Bemis told Jane what they had done was a secret.

Two days after Jane's CAST interview, Bemis voluntarily submitted to an interview with police. According to Officer Jengeleski, Bemis said of Jane's visit: " 'When she was running around the house, when she came to sit next to me, before she sat down and scooting next to me, she sat there, legs open, and looked at me for a good five seconds before I paid her any attention.' " Bemis further explained that Jane was wearing clothes, " 'like, black, tight frickin' like yoga legging things' " but it did not appear she had anything on underneath the leggings. Asked if they were see-through, Bemis responded, " 'No, you couldn't [see through], but it didn't look like she had anything on. Only thing I asked her, "Are you wearing any underwear?" And she swore yes. Like, okay, I'll leave it at that.' "

Officer Jengeleski asked Bemis if Jane asked Bemis to touch her. Bemis said no. The officer then asked if Jane " 'might be a little provocative.' " Bemis responded, " 'I really do pay attention to that, but [*sic*].' " Later in further considering the question, Bemis added, " 'I'm gonna answer your question that you had earlier. Talking about this, I started thinking back. The question you asked me, is she provocative. Granted, I know what that word means. She can be considered that.' " Bemis consistently and repeatedly denied touching Jane. Asked if she wanted to see Jane's vagina to see if it would turn her on, Bemis said, " 'I didn't—I wouldn't even do that.' "

Officer Jengeleski confiscated two cell phones, a laptop, and a thumb drive belonging to Bemis. Investigators discovered on the devices "a very large amount of animated child porn." No photos of Jane were found on the devices.

Defense Evidence

The defense presented testimony from two of the people in Bemis's apartment the evening of Jane's visit.

Codie D. met Bemis in 2014 and at some point invited Bemis to move into the empty room in her apartment. The evening Bemis brought Jane over, Codie sat at the computer desk to do work. Jane Doe was "very hyper, running, bouncing off of furniture, jumping. Not calm." Eventually, Jane ran into Bemis's bedroom and starting running and jumping there. Codie heard Bemis ask Jane to calm down. From the

computer desk, Codie could see into Bemis's room. During Jane's visit, the door, which had no locks, was "completely open" the "whole time." Codie observed Bemis sitting by the couch in her room the entire time trying to get Jane to calm down. When the visit ended, Codie remembered Bemis tell Jane she was going to take her home because she was too hyper and that they would try another day to visit. Codie did not notice any change in Jane's behavior when they left.

Lonnita B. was a lifelong friend of Codie and became friends with Bemis. Lonnita was visiting the apartment when Bemis brought Jane over. When they arrived, Jane was "very happy and bubbly" and "very highly energetic." During Jane's entire visit, Lonnita watched television from the couch. Immediately inside the doorway of Bemis's room, there was another couch, where Bemis sat the entire time. Jane was "bouncing on the couch. She would move and bounce on the bed." Lonnita recalled that Bemis's door, which had no lock, was open the entire time, and she could see into part of the bedroom. Bemis "was sitting there trying to get the child to calm down." Lonnita did not notice anything about Jane's visit that was concerning and said that Jane was "still very happy, very bubbly" when she and Bemis left the apartment. On cross-examination, Lonnita acknowledged that she did not watch the door to Bemis's room, or Bemis or Jane, the entire visit.

Bemis did not testify.

The jury found Bemis guilty of a lewd act upon a child. On the severed count, Bemis pled no contest for her failure to register as a sex offender. The trial court sentenced her to eight years in prison. Bemis appeals.

DISCUSSION

I. Prior Sex Offenses

Bemis argues the trial court erred by permitting the prosecution to present evidence of two sexual offenses she committed several years prior to the charged offense in this case. She contends the evidence had only minimal probative value and created a serious danger of undue prejudice. We disagree.

The prosecution moved in limine to introduce evidence of other sexual offenses committed by Bemis pursuant to Evidence Code section 1108. The trial court admitted the evidence of offenses that occurred in 2007 and 2012.

The following evidence was presented to the jury:

In 2007, Bemis was 12 years old and living in a transitional house with his mother, Delisse J., and his four-year-old and sixteen-month-old sisters. His mother testified that one evening after she sent the children to bed, she found Bemis "on his knees beside [his sister's] bed . . . . [H]e had her little vaginal area spread apart. His head was down by there." His sister's legs were spread apart and her pants and underwear were pulled down. Bemis's mother hit him, asked what he was doing, and informed house staff. Bemis told his mother "he wasn't doing anything" and that his sister "wanted it to happen." Later, in juvenile court, Bemis admitted a violation of Penal Code section 243.4, subdivision (a) for sexual battery..

In 2012, Bemis lived around the town of Scotia. Jennifer S. lived in the area with her boyfriend and her two daughters, ages seven and eight. Jennifer testified that one day after her eight-year-old returned home later than usual from playing "fort" with her best friend, a seven-year-old neighbor boy, she asked her daughter why she was late but received no response. Eventually, her daughter explained that she and her friend had an encounter with Bemis, a teenager in the neighborhood. Bemis asked them whether they wanted to see his fort. The three headed to a train car next to some train tracks down by a creek. On the way, they stopped, Bemis sat down and asked the boy "to go keep a lookout." Bemis asked the girl to sit on her lap, and she did. Bemis told the girl she reminded her of a niece or sister. The little girl got up, decided she needed to check in at home, and left. Jennifer and the mother of her daughter's playmate spoke to police about the incident. In juvenile court, Bemis admitted a violation Penal Code section 647.6, subdivision (a) for annoying or molesting a person under the age of 18.

Under Evidence Code section 1101, evidence the defendant committed a prior crime is generally inadmissible to prove a defendant likely committed a later crime. (Evid. Code, § 1101, subd. (a).) However, Evidence Code section 1108, subdivision (a),

provides an exception to this rule, allowing the admission of evidence of a prior sex offense when a defendant is charged with a sex crime. (Evid. Code, § 1108, subd. (a).)[2] To prevent unfair misuse of such propensity evidence, the trial court must analyze whether it is admissible under Evidence Code section 352. (*Ibid.*; *People v. Falsetta* (1999) 21 Cal.4th 903, 916-918, 920 (*Falsetta*).)

We review a trial court's decision to admit evidence pursuant to Evidence Code section 1108 for abuse of discretion in applying the standards of Evidence Code section 352. (*People v. Hollie* (2010) 180 Cal.App.4th 1262, 1274.) "We will not overturn or disturb a trial court's exercise of its discretion under section 352 in the absence of manifest abuse, upon a finding that its decision was palpably arbitrary, capricious and patently absurd." (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314 (*Jennings*).)

There was no abuse of discretion here. The trial court recognized the Evidence Code section 1108 evidence of Bemis's prior sex offenses was offered for the permissible purpose of showing Bemis's disposition to commit sex crimes. It noted the two juvenile adjudications under Penal Code sections 243.4, subdivision (a) and 647.6, subdivision (a) were for the types of "sexual offenses" subject to admission under Evidence Code section 1108. In admitting evidence of these offenses, the trial court also made clear that it was weighing the considerations that arise under Evidence Code section 352. It addressed the similarities between the prior offenses and the charged offense. All three involved physical contact with prepubescent minor females isolated by Bemis. Although the earlier offense in 2007 was "somewhat remote in time," it was not too remote given Bemis was undergoing sex offender treatments under the juvenile court's supervision until shortly before the conduct charged in this case. The court further observed there was "a degree of certainty" because the prior offense evidence arose from adjudications. The court expressly ruled "under a 352 analysis" the prior offense evidence would be

[2] Evidence Code section 1108, subdivision (a) provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by section 1101, if the evidence is not inadmissible pursuant to Section 352."

admissible to establish predisposition to commit sex offenses under Evidence Code section 1108. This conclusion was reasonable.

Bemis contends the prior sex offense evidence was of minimal probative value because the prior offenses were dissimilar to the charged offense. But Evidence Code section 1108 does not require " ' "exacting requirements of similarity between the charged offense and the defendant's other offenses . . . ." ' [Citation.] Such a requirement was not added to the statute because 'doing so would tend to reintroduce the excessive requirements of specific similarity under prior law which [section 1108] is designed to overcome, . . . and could often prevent the admission and consideration of evidence of other sexual offenses in circumstances where it is rationally probative.' " (*People v. Soto* (1998) 64 Cal.App.4th 966, 984 (*Soto*).) Here, the trial court found the prior sex offenses were sufficiently similar. All three offenses involved young prepubescent minor females whom Bemis isolated prior to contact. These commonalities allowed the trial court to reasonably find the evidence was not outweighed by any potential undue prejudice. Further, "any dissimilarities in the alleged incidents relate only to the weight of the evidence, not its admissibility." (*People v. Hernandez* (2011) 200 Cal.App.4th 953, 967.) The differences raised by Bemis would not be grounds for exclusion.

Bemis also argues "the probative value of the prior offenses was slight as they were remote in time from the charged offense." "No specific time limits have been established for determining when an uncharged offense is so remote as to be inadmissible." (*People v. Branch* (2001) 91 Cal.App.4th 274, 284.) The two prior offenses took place nine and four years prior to the charged crime. Both offenses were not so remote in time as other offenses that have been held to be properly admitted under Evidence Code section 1108. (See *id.* at pp. 284-285 [30-year-old offense admitted]; *People v. Waples* (2000) 79 Cal.App.4th 1389, 1395 [20-year-old offense]; *People v. Ewoldt* (1994) 7 Cal.4th 380, 405 [12-year-old offense].) The court could reasonably conclude the timing of Bemis's earlier offenses did not make them inadmissible.

Finally, Bemis argues the risk of undue prejudice from the prior offense evidence was "intolerably high" because it was more inflammatory than the evidence of the charged offense. She also asserts a risk of undue prejudice because the evidence of the prior offenses was stronger than the evidence about the charged offense, and could have bolstered Jane's credibility in a comparatively weak case. "[T]he test for prejudice under Evidence Code section 352 is not whether the evidence in question undermines the defense or helps demonstrate guilt, but is whether the evidence inflames the jurors' emotions, motivating them to use the information, not to evaluate logically the point upon which it is relevant, but to reward or punish the defense because of the jurors' emotional reaction." (*People v. Valdez* (2012) 55 Cal.4th 82, 145.) We do not consider the evidence of the prior offenses more inflammatory than the charged offense. All the charges involved Bemis isolating a minor girl for improper sexual contact. The evidence of Bemis's prior sex offenses was not unduly prejudicial but merely the type of prejudice inherent in all propensity evidence. (See *Soto, supra*, 64 Cal.App.4th at p. 992.)

We also disagree that the purported strength of the prior offense evidence compelled its exclusion. Even if the evidence of the prior offenses was more definitive than Jane's testimony, the trial court gave extensive instructions regarding the limited use of the evidence. The court advised the jury that if it concluded Bemis committed the offenses, "[i]t is not sufficient by itself to prove that the defendant is guilty of committing a lewd and lascivious act on a child under the age of 14 years. The People must still prove the charge beyond a reasonable doubt. [¶] Do not consider this evidence for any other purpose." The trial court did not abuse its discretion in admitting evidence of Bemis's prior sex offenses.

II. Uncharged Acts

Bemis argues the trial court also erred by permitting the prosecution to introduce evidence of uncharged acts, namely, her possession of animated child pornography and semen-stained girls underwear, to prove Bemis's sexual desires towards children. Again, we disagree.

The prosecution's motions in limine included evidence that Bemis possessed a lot of animated child pornography that suggested a deviant interest in prepubescent girls, and numerous pairs of girls' underwear stained with Bemis's semen to prove Bemis's lust or sexual desires to show the required intent. The trial court ruled the evidence admissible.

The following evidence was presented to the jury:

After Bemis vacated the apartment she shared with Codie, a plastic bag containing what appeared to be unwashed girls underwear was found in the closet of her former bedroom. Officer Jengeleski was notified and retrieved 13 pairs of underwear from the apartment which were entered into evidence. The forensic scientist who examined them explained the clothing appeared to be girls underwear and it ranged in size from 5/6 to XL 14. He observed and tested several white or yellow stains inside and outside each pair. Semen was discovered on each. Another criminalist, an expert in DNA profiling, tested the DNA profile of the semen and concluded it matched Bemis's. There was no indication of Jane's DNA on any of the samples taken from the underwear. In his interview with Officer Jengeleski, Bemis denied the underwear was hers.

A District Attorney investigator, an expert in data extraction and data forensics and analysis, testified about the animated child pornography discovered on Bemis's electronic devices. The investigator estimated there were over 100 images on Bemis's phones and thousands of images on the other devices. On the laptop, the images were saved in a folder entitled "H Manga," a designation for animated child pornography. In that folder were other folders with titles such as "Daddy's Girl," "Bath Time," "Loli-Toddlercon," and "Hentaii." The investigator explained that "Loli" is an abbreviation for "Lolita," a name commonly used in child pornography. "Hentaii" also referred to child pornography. Approximately 33 images from the devices were admitted into evidence, and a handful were published to the jury. One image depicted a man with a bag over his head holding a toddler and pulling down her panties to reveal her vagina. Another image depicted a man with his pants undone penetrating a female toddler with his erect penis with white liquid coming out around her vagina. Another image depicted a man inserting his erect penis into a female toddler's vagina.

As discussed above, Evidence Code section 1101, subdivision (a), prohibits the admission of character evidence if offered to prove conduct in conformity with that character trait. (Evid. Code, § 1101, subd. (a).) However, Evidence Code section 1101, subdivision (b) provides an exception to this rule for uncharged acts when relevant to prove some fact other than predisposition, such as motive, intent, or knowledge. (Evid. Code, § 1101, subd. (b).) "Evidence of uncharged crimes is admissible [for these purposes] only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent.' " (*People v. Lenart (*2004) 32 Cal.4th 1107, 1123.) If so, the evidence is admissible unless "unduly prejudicial, confusing, or time consuming" under Evidence Code section 352. (*People v. Leon* (2015) 61 Cal.4th 569, 598 (*Leon*).) Again, we review the trial court's decision to admit this evidence for an abuse of discretion. (*Jennings, supra,* 81 Cal.App.4th at p. 1314.)

There was no abuse of discretion here. The evidence of uncharged acts was offered under Evidence Code section 1101, subdivision (b) to establish the intent prong of the charged offense. The charge required proof that "defendant committed the [lewd or lascivious] act with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of [himself/herself] or the child." (Pen. Code, § 288, subd. (a).) The court found the child pornography relevant to Bemis's intent because the images depicted children who were around Jane's age. Likewise, the court found the underwear both relevant and probative of Bemis's intent given they were worn by girls the same age as Jane and many of them tested positive for Bemis's semen. Also, in admitting the evidence, the court again made clear it understood its obligations under Evidence Code section 352. It found the evidence of both uncharged acts would not confuse the jurors or take an undo amount of time. In light of its relevance, the court concluded its probative value was not outweighed by the danger of undue prejudice. This, too, was a reasonable ruling.

Bemis argues the uncharged acts were substantially dissimilar from the charged offense. He asserts the charged offense involved "at worst a single act of touching with

[Bemis's] finger" whereas the uncharged offenses "suggested the commission of actual sex acts, or the depiction thereof in pornography."

In *Leon*, the California Supreme Court explained, " 'The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.] . . . In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant " 'probably harbor[ed] the same intent in each instance.' [Citations.]" [Citation.]' [Citation.] Greater similarity is required to prove the existence of a common design or plan. In such a case, evidence of uncharged misconduct must demonstrate ' "not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." [Citation.]' . . . Finally, the greatest similarity is required to prove identity. When offered on this point, 'the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts.' [Citation.]" (*Leon*, *supra*, 61 Cal.4th at p. 598.)

There is of course a difference between possessing materials to carry out private fantasies not directed towards real children and the charged offense. However, the uncharged acts were sufficiently similar to the charged offense presented to prove Bemis's intent. The uncharged acts involved the sexualization of young girls. This was enough to support the inference that Bemis harbored lust or sexual desire in her interaction with Jane during her visit.

Bemis also argues the uncharged acts had only "slight relevance" to issues at trial and it was error to admit them because their probative value was outweighed by their "extreme undue prejudice and . . . unreasonable consumption of time." Bemis calls the uncharged acts evidence "especially inflammatory" because it suggested she possessed the cartoons so she could fantasize about committing coercive sex acts with children in the future and might actually act on those fantasies, thus inviting the inference she was an evil person. On all points, we disagree. Admitting the uncharged acts into evidence did not require an unreasonable consumption of time. Nor was the evidence any more

inflammatory than the charged offense, which involved the actual touching of a minor girl. In addition, the jury was instructed to consider this evidence only for intent and not for any improper purpose. The court advised, "If you decide that the defendant committed the act, you may, but are not required to, consider that evidence for the limited purpose of deciding whether the defendant acted with the intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of himself or the child in this case, or the defendant had a motive to commit the offense alleged in this case. Do not consider this evidence for any other purpose. Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime." The trial court did not abuse its discretion in admitting evidence of the uncharged acts.[3]

III. Cumulative Error

Lastly, Bemis contends the court must reverse based on cumulative prejudice from the trial court errors. Since we have rejected each of Bemis's claims of error, there was no cumulative prejudice.

DISPOSITION

The judgment is affirmed.

[3] Since we conclude there was no evidentiary error with respect to the uncharged acts, we do not address the parties' harmless error arguments.

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Siggins, P.J.

WE CONCUR:

_____
Fujisaki, J.

_____
Wiseman, J.[*]

People v. Bemis, A151738

[*] Retired Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.